Petition

81-800

UNITED STATES SUPREME COURT

JOHN J. RILEY,
Petitioner Pro Se

V.

UNIVERSITY OF LOWELL, ET AL
Respondents

NO.

RECEIVED
SEP 23 1981
OFFICE OF THE CLERK
SUPREME COURT, U.S.

MOTION TO PROCEED AS VETERAN UNDER U.S. SUP. CT. RULE 47.1

The petitioner pro se respectfully requests the Honorable Court to proceed under Rule 47.1 in typewriting his petition and having fees and Court costs waived. The petitioner is a "special-disabled handicapped veteran" under Title 38 U.S.C., §§2011-2022 and this action is a personnel one involving him and his employers. A certification from the Veterans Administration is attached herewith.

PETITIONER'S AFFIDAVIT IN SUPPORT OF ABOVE MOTION

I, John J. Riley, Petitioner Pro Se, do solemnly swear under the pains and penalties of perjury that I am a special-disabled handicapped veteran under Title 38 U.S.C. §2011 from wounds and injuries incurred in combat in 1945.

SIGNED UNDER THE PAINS AND PENALTIES OF PERJURY THIS 21st DAY OF SEPTEMBER, 1981

JOHN J. RILEY
Petitioner Pro Se
P.O. Box 547
Hollis, New Hampshire 03049

COMMONWEALTH OF MASSACHUSETTS

Then personally appeared before me the aforesaid John J. Riley, and gave oath that the foregoing statements were true to the best of his knowledge and belief, this 21st day of September, 1981.

Notary Public
My Commission expires 5/19/88

John Fitzgerald Kennedy Federal Bldg
Government Center
Boston MA 02203

Veterans Administration

February 10, 1981

John J. Riley
P.O. Box 547
Hollis, NH 03049

Dear Mr. Riley:

The following certificate is furnished for your use in establishing Civil Service preference.

This is to certify that the records of the Veterans Administration disclose that
JOHN J. RILEY
is in receipt of disability compensation on account of service-connected disability rated at (30 percent or more) [redacted]. This payment is made in accordance with public laws administered by the Veterans Administration.

Sincerely yours,

Charles T. Sweeny
CHARLES T. SWEENY
Veterans Services Officer

In Reply Refer To: 301/27$_2$

08 036 384

FL 21-802
Feb 1980 (R)

[redacted]

[redacted]

SUPREME COURT OF THE UNITED STATES

RECEIVED
OCT 5- 1981
OFFICE OF THE CLERK
SUPREME COURT, U.S.

JOHN J. RILEY, Petitioner Pro Se

V.

UNIVERSITY OF LOWELL, ET AL
Respondents

NO.

SUPPLEMENTAL INFORMATION IN SUPPORT OF PETITIONER'S MOTION TO PROCEED UNDER U.S. SUP. CT. RULE 47.1

1. Petitioner herewith offers supplemental information in support of his motion to proceed under Rule 47.1 under Title 38 U.S.C. §§ 2011 et seq., especially § 2012, as a "special disabled handicapped veteran" of World War II working in an institute having Federal contracts over $100,000.

2. The wounds, disability, and handicapped aspects appear in the following instances of the case:

a. Original Complaint (also includes Federal contract clause)
b. Substitute Amended Complaint
c. Petitioner's Deposition for respondents
d. Petitioner's testimony under direct and cross examination
e. Testimony of expert witness, a V.A. medical doctor
f. Statement of Facts in Respondent's Brief on Appeal
g. Included as a basis for Count IV: "Intentional Infliction of Emotional Distress," mentioned in instant Petition (para. 2, p. 3), within Petitioner's STATEMENT OF THE CASE.

Respectfully,

John J. Riley, Petitioner Pro Se
P.O. Box 547
Hollis, N.H. 03049

OFFICE OF THE CLERK
SUPREME COURT OF THE UNITED STATES
WASHINGTON, D. C. 20543

October 14, 1981

John J. Riley
P.O. Box 547
Hollis, NH 03049

Dear Mr. Riley:

On October 5 we received your supplement in support of your motion to proceed as a veteran. My questions concerning your motion did not relate to your status as a handicapped or disabled veteran but to whether you are establishing re-employment rights, as 38 USC 2011 does not specifically deal with proceeding without fees in filing any appeal or petition in any case, regardless of subject matter, which a veteran might file. I suggest that you should address the issue of whether this is the type of case in which you are permitted to proceed as a veteran. In any event, please forward to this office a copy of the order of the Court of Appeals permitting you to proceed in that court as a veteran.

Very truly yours,

ALEXANDER L. STEVAS, CLERK

by

Margaret H. McFarland
Assistant Clerk

P.O. Box 547
Hollis, N.H. 03049
October 19, 1981

RECEIVED
OCT 24 1981
OFFICE OF THE CLERK
SUPREME COURT, U.S.

Margaret H. McParland, Assistant Clerk
Office of the Clerk
Supreme Court of The United States
Washington, D.C. 20543

Dear Miss McFarland:

In response to your letter of October 14 last, enclosed herewith is a copy of my motion to the First Circuit Court of Appeals to proceed as a veteran and a copy of the Order of the Court dated July 20, 1981.

Although, as you say, Title 38 USC 2011 does not specifically deal with proceeding without fees, it places the specially disabled-handicapped veteran under the aegis of Title 38, while 2012 deals with personnel action, including promotion, as did 2022. Indeed, it appears that time has obviated 2022, written especially to protect returning World War II veterans; whereas, it is offered, 2011 et seq. has subsumed its purpose and should be looked upon at least in pari materia with it, and I refer to Rule 47.1's qualifying phrase: "or under similar provisions of law...."

In any event, I should like to have the motion go forward with all supplemental material I've offered, and if it is denied, I shall have to proceed under Rule 33 and pay docketing fees, inasmuch as I cannot in good faith enter in forma pauperis.

Sincerely,

John J. Riley, Petitioner Pro Se

Encl.: cys. of motion
and 1stCA Order

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

RECEIVED
OCT 24 1981
OFFICE OF THE CLERK
SUPREME COURT, U.S.

JOHN J. RILEY,
Plaintiff, Appellant
Pro Se

v.

University of Lowell, et al
Defendants, Appellees

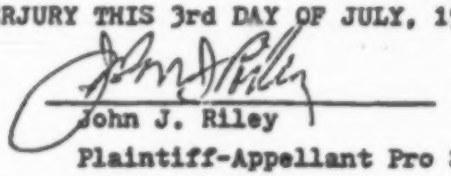
NO. 80-1324

Appellant's Motion To Be Absolved From Costs of The Court's Printing and Publishing Decision

---

The plaintiff-appellant pro se hereby respectfully requests the Court that he be absolved from the costs of printing and publishing the Court's decision in the above case, inasmuch as the action brought by him essentially was one of personnel action in an organization doing business with the Federal government in excess of $10,000; and the plaintiff-appellant pro se is a "special disabled-handicapped veteran" 38 §§ 2011-2022 U.S.C.; furthermore, in Title 28, Revised Rules of the Supreme Court of the United States at Rule 47.1, the Supreme Court waives fees and court costs for veterans under similar provisions.

SIGNED UNDER THE PAINS AND PENALTIES OF PERJURY THIS 3rd DAY OF JULY, 1981



John J. Riley
Plaintiff-Appellant Pro Se
P.O. Box 547
Hollis, N.H. 03049

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

RECEIVED
OCT 24 1981
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 80-1324.

JOHN J. RILEY,
Plaintiff, Appellant,

v.

UNIVERSITY OF LOWELL, ET AL.,
Defendants, Appellees.

ORDER OF COURT

Entered July 20, 1981

Upon consideration of appellant's motion,

It is ordered that this Court's Taxation of Costs entered July 14, 1981 be vacated and that no costs be awarded in favor of the appellees.

In accordance with F.R.A.P. Rule 39(a), the Clerk of the District Court is hereby requested to delete the costs from the mandate of this Court.

By the Court:

DANA H. GALLUP, Clerk.

By /s/ Francis P. Scigliano
Chief Deputy Clerk.

[Cert. cc: Clerk, U.S.D.C. Massachusetts, cc: Mr. Riley and Mr. Bellotti.]

81-800

81-800
9-23

SEP 23 1981
ALEXANDER L. STEVAS
CLERK

RECEIVED
SEP 23 1981
OFFICE OF THE CLERK
SUPREME COURT, U.S.

NO._____

OCTOBER TERM, 1981

IN THE SUPREME COURT OF THE UNITED STATES

JOHN J. RILEY, Petitioner Pro Se

V.

UNIVERSITY OF LOWELL, ET AL, Respondents

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

JOHN J. RILEY
Petitioner Pro Se
P.O. Box 547
Hollis, New Hampshire,
03049

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NO._____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

JOHN J. RILEY, Petitioner Pro Se

V.

UNIVERSITY OF LOWELL, ET AL, Respondents[1]

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE 1ST CIRCUIT

Petitioner prays that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the First Circuit entered on June 23, 1981.

QUESTIONS PRESENTED FOR REVIEW

I. In instant discrete ADEA case was Petitioner entitled, as presented in other Circuits, to have the District Court define and explain the terms "prima facie","a determining factor" in instructions to the jury and to read the McDonnell-Douglas v. Green paradigm with these elements?

II. Did the trial judge marshal evidence in the instant ADEA action to the detriment of petitioner and thus render jury verdict invalid?

III. Was the District Court in fundamental error in failing further to instruct jury at request of petitioner at bench conference that the jury should explore the question of irrationality as pretext (McDonnell 4th prong) in the respondents' promotion procedure?

IV. Since Loeb v. Textron, 600 F.2d 1003 (1979) was a First Circuit decision which dispensed narrowly (2-1) with the presentation of prima facie definition and explanation in light of the McDonnell paradigm in ADEA cases at Lower Court, would objection by

[1]Specifically, the University, William Hogan, John B. Duff, Leon Beghian, William Diamond, Francis Walsh, Gerard O'Connor, William McCaffrey, Howard K. Moore, Charles E. Jarvis and Roger Wiehe.

petitioner under Rule 51, Fed. Rules Civ. Proc. 28 U.S.C.A., have been a mere formality and meaningless?

V. In First Circuit's opinion in instant case was decision not to promote petitioner "governed by , subjective discretionary elements...i.e., excellence in teaching and research" pretexual and deliberately misleading to jury inasmuch these elements were not in the stipulated, contractual criteria for full professor at the time of the ADEA alleged violations (1975-77)?

CITATIONS TO OPINIONS BELOW

A copy of the decision and order of the District Court for Massachusetts concerning above captioned case is appended hereto (Appendix A). A copy of the citation and opinion of the Court of Appeals for the First Circuit concerning same is appended hereto (Appendix C).

JURISDICTION

The judgment of the Court of Appeals for the First Circuit was entered on June 23, 1981. The jurisdiction of this Court is invoked under Title 28 U.S.C. 1254(1) and U.S. Sup. Ct. Rule 17.1(c), 28 U.S.C.A (Revised).

CONSTITUTIONAL STATUTES AND REGULATIONS WHICH THE CASE INVOLVES

The instant case involves the Age Discrimination in Employment Act (ADEA). 29 U.S.C., §§621-634, Fed. Rules of Civil Procedure, Rule 51, 28 U.S.C.A., Fed. Rulesof Evidence, Rules 401, 406, 403, 611.

STATEMENT OF THE CASE

1. Petitioner, pro se, John J. Riley, Ph.D., 59 year-old tenured associate professor since 1974 and English Staff member of respondent University for 21 years, brought action pro se in Lower Court against respondents in March and November 1976 under 29 U.S.C, §621 et seq., Age Discrimation in Employment (ADEA) (1975-77) and subsequent retaliation (1976-present)

623(a)(d), 1st and 14th Amendments to the Constitution, 42 U.S.C., §§1983 and 1985. Petitioner withstood summary judgment motion to dismiss under ADEA and §1985 in July 1976 (Appendix B). Jurisdiction in lower court was also under 28 U.S.C., §1343(1)-(4).

2. Subsequently, the district judge retired and case was assigned to a newly appointed judge. Petitioner's counsel filed a Substitute Amended Complaint under ADEA discrimination and retaliation clauses, §1985, and Intention Inflicting of Emotional Distress, a pendant tort claim under jurisdiction of U.S. Mine Workers v. Gibbs, 383 U.S. 715 (1966).

3. The case was heard on April 8, 9, and 10, 1980, Respondents Duff, Diamond and McCaffrey absent. Verdict against petitioner and Order was entered April 14, 1980. Petitioner appealed on all counts. The Court of Appeals affirmed the decision of the District Court on June 23, 1981.

4. Petitioner alleges in Question I that by Stipulation of both parties by physical evidence, research, publication, and recognition by international learned societies, and by testimony not only from witnesses but from respondents themselves that he was qualified for full professorship, he more than met the "classic" McDonnell-Douglas v. Green prima facie paradigm as related to ADEA cases "in haec verba" by the Court's decision in Lorillard v. Pons, 434 U.S. 575, 584 i.e.,

(i) He was in the protected age group (53 years old at time of original Complaint);

(ii) There was one promotion job available (stipulated) and he was qualified (respondents' testimony);

(iii) He was denied the job (stipulation); and

(iv) The position was filled by a younger person outside the protected group[2] (respondents' testimony).

---

[2]This 4th prong has been modified slightly from the original Title VII one in Price v. Maryland Casualty Co., 561 F.2d 609, 612 (5th Cir. 1977); Powell v. Syracuse University, 580 F.2d 1150, 1155 (2d Cir. 1978); and McCorstin v. U.S.Steel Corp., 621 F.2d 749, 753 (5th Cir. 1980).

5. The District Court in instructions no where discusses or defines or explains a "prima facie" case, and ignoring the stipulation of uncontested facts about that "someone", and the stipulation of uncontested facts about that "someone" and then goes on at length to say that anyone, 32, 34, 36 years old could be promoted rather than the petitioner. And furthermore, regarding Question III in this petition, District Court fails further to instruct the jury at request of petitioner's counsel (bench conference) that jury should explore the question of irrationality in promotional procedure by respondents as a pretext. In giving 2 "yes" or "no" items in the verdict slip on age discrimination (Count 1) to jury, trial judge says for item 2: "Was age a determining factor?...that's the 'but for' I gave you earlier." The "but for" was put hypothetically in the mind and mouth of the petitioner. Nowhere does trial judge define "determining factor". Nor does he explain or define the concept of retaliation (Count 2).

6. As for Question II, the trial judge denied as evidence record of discovery from respondents showing a pattern of promotions to full professor discriminatory to petitioner with respect to age. The trial judge also denied as evidence record of discovery from respondents showing retaliation. The trial judge allowed repetitious and cumulative testimony of respondents over petitioner's continual objections, allowed material of accusatory and prejudicial nature against petitioner over objection, material which petitioner was never confronted with or allowed to defend himself from in his working place, and allowed repetitious respondents' testimony over objection once more, just before his instructions. And in instructions to the

jury, trial judge goes on at length to justify respondents' reasons for promoting someone other than petitioner but fails to summarize in any manner the qualifications of the petitioner presented by stipulation, physical evidence, witnesses, and testimony by respondents themselves that petitioner was qualified to be full professor; furthermore, as stated in paragraph above, trial judge fails further to instruct jury at petioner's request that it explore the question of irrationality as pretexual in respondents' promotion procedure. Also, in instructions, trial judge frames an imaginary statement by petitioner stating thus: "My age made the determining factor in why I wasn't promoted," and characterizes respondents' reasons for not promoting petitioner as "good reasons" [emphasis petitioners]; furthermore, trial judge gives yes/no verdict slip "was age a determining factor?" Without defining "determining factor". (Counts 1 and 2).

7. Petitioner alleges that facts above constitute a marshalling of evidence under ADEA against him tantamount to a directed verdict and renders jury verdict invalid.

8. As for Question IV, First Circuit Opinion agreed with respondents petitioner's argument against jury instruction was fatally flawed because petitioner did not object. In Loeb v. Textron, 600 F.2d 1003, First Circuit dispensed at 1009 with prima facie definition and explanation in the light of the McDonnell paradigm in an ADEA case where prima facie definition and explanation had been made in jury instructions at a lower court. N. 2 at 1009. Instant case is under First Circuit. Circuit interpretation prevails and controls at lower court. Trial judge followed Loeb opinion; therefore, petitioner alleges objection under Rule 51, Fed. Rules Civ. Proc., 28 U.S.C.A. would have been a mere formality and meaningless.

9. As for Question V, the stipulated, contractual criteria for promotion to full professor at the time of the alleged violations

under ADEA in 1975-1977 contain no mention of "excellence in teaching and research". The teaching ability evaluation for the 34 year old promoted in place of petitioner revealed on discovery and petitioner's exhibit only average level rather than "excellent", and his publications minimal. Petitioner alleges elements governing decision not to promote him in 1975 and 1976 at the ultimate level even though he was recommended at the academic levels for promotion were highly subjective, misleading the jury, and pretextual. The term "excellence in teaching" (never mentioned in South Campus contract) was abandoned in light of disastrous student evaluations and omitted in subsequent contracts.

REASONS WHY THE WRIT OF CERTIORARI SHOULD BE GRANTED

10. The petitioner has not been promoted since he first brought ADEA action in 1975, although he has applied and was approved for promotion by his department each year since then.

11. His contentions of error involve (1) that he was denied proper instructions by trial judge's refusing to explain and define the terms "prima facie" and "a determining factor" for a true understanding of the ADEA law and its shifting rebuttal burdens by a jury as determined in McDonnell-Douglas v. Green, 411 U.S. 792, 802 (1972) as applied to ADEA "in haec verba" in Lorillard v. Pons, 434 U.S. 575, 584. This usage of prima facie with explanation and definition to jury was contended for at length by dissenting circuit judge in Loeb, supra at 1024, 1025. Prima facie was clearly defined and explained with its shifting burden of rebuttal by the trial judge in that case. N. 2 at 1009. See Texas Department of Community Affairs v. Burdine, 49 U.S.L.W. 4214 (1981) at 4216 and N. 6; Smith v. University of North Carolina, 632 F.2d 316, 332-33 (4th Cir. 1980); Schwager v. Sun Oil Co. of Pennsylvania, 591 F.2d 50,

60-61 (10th Cir. 1979); Price v. Maryland Casualty Co., 561 F.2d 609, 612 (5th Cir. 1977); Kentroti v. Frontier Air Lines, 585 F.2d 967 (10th Cir. 1978); Powell v. Syracuse University, 580 F.2d 1150, 1154-56 (2nd Cir. 1978); McCorstin v. U.S.Steel Corp., supra, at 753.

12. As for failure to instruct, explain, and define "a determining factor" to the jury, petitioner offers concise explanation and definition of Langesen v. Anaconda Co., 510 F.2d 307, 317 (6th Cir. 1975); Spagnuolo v. Whirlpool Corporation, 641 F.2d 1109, 1112 and N. 1 (see the use of "the determining factor" in instructions to jury in instant case, para.6 above)(4th Cir. 1981); Bentley v. Stromberg-Carlson Corporation, 638 F.2d 9, 11 (2nd Cir. 1981); and Geller v. Markham, 635 F.2d 1027, 1035, Cert. denied, 49 U.S.L.W. 3803 (1981), where 2nd circuit approved trial judge's instruction of "one reason" (age) as being adequate, when taken in context of causation, being a 'factor...[which] made a difference,'" i.e., the employee's fortunes would have been "different" without the discrimatory action and age discrimination was therefore a "but for" cause of the result that did take place. Petitioner's promotion did not take place.

13. As for petitioner's contention of error of prejudice raised in Question II, petitioner refers to paras. numbered 4, 5, 6 and 7 above. He cites a support of his contention Bentley v. Stromberg-Carlson Corporation, supra, 9-12; Tyler v. Dowell, Inc., 274 F.2d 890, at 897, Cert. den., 363 U.S. 812, 4 L.Ed. 2d 1152:

> Jury trials were founded on common law when the Constitution was adopted, and under such law, Judge was governor of the trial with the inescapable duty to fully and correctly instruct the jury on the applicable law of the case, and to guide, direct, and assist the jury towards an intelligent understanding of the legal and factual issues involved in a search for truth. 897; Fed. Rules of Evidence, Rules 401, 403, 406, 611; Quercia v. United States, 289 U.S. 466, 469-70.

14. As for petitioner's contention of error in Question III, he refers also to paras. 4, 5 and 6 above in STATEMENT OF THE CASE. If the jury doesn't know or understand that "irrationality"in promotion procedure is respondents' rebuttal to the fourth prong of the McDonnell paradigm and then is not instructed by trial judge as requested by petitioner to make clear to the jury that it can explore the question of pretext, how can it render a just verdict? Petitioner cites McDonnell, supra,804-5; Loeb, supra, Bownes, C.J. dissenting at 1025; Texas Department of Community Affairs, supra, at 4216 and N. 8;Bentley,supra,9-11

15. Concerning Question IV, petitioner refers to para. 8 above in STATEMENT and cites fundamental error argument with citations, para. 14 immediately above; exception to Rule 51 in cases where objection would have been a mere formality, Sessions v. Union Savings and Trust Co., 338 F.2d 752, 759 (6th Cir. 1964); where error was obvious and prejudicial, paras. 4, 5, 6 and 13 above, McNello v. John B. Kelly Inc., 283, F.2d 96 (3rd Cir. 1960); Batersole v. Stratford, 505 F.2d 804, 808 (6th Cir. 1974).

16. Concerning Question V, petitioner refers to para. 9 in STATEMENT above, and to petitioner's exhibit number 11, Teaching Ability/Evaluation, which revealed the 34 year old promoted in place of petitioner placed less than average, and his research for that year (1975) was minimal. Petitioner cites McDonnell, supra at 804; Powell v. Syracuse University, supra at 1154-1155; Flowers v. Crouch-Walker Corp., 552 F.2d 1277 at 1283 (7th Cir. 1977). The nature of respondents' defense, characterized by First Circuit opinion as "governed by subjective, discretionary elements...i.e., excellence in teaching and research" (P.3), in order to rebut legally mandatory presumption (4th prong of McDonnell), was manifestly pretextual and deliberately misleading to the jury, which defense trial

judge failed to summarize in his instructions.

CONCLUSION

The petitioner respectfully requests that the Honorable Court grant the writ of Certiorari to the Court of Appeals for the First Circuit.

JOHN J. RILEY
Petitioner Pro Se
P. O. Box 547
Hollis, New Hampshire 03049

CERTIFICATE OF SERVICE

I swear under pains and penalties of perjury that two copies of the above petition were sent by certified mail, return receipt requested to respondents' counsel, Francis X. Bellotti, Attorney General of Massachusetts, One Ashburton Place, Boston, Massachusetts 02108 on 21st day of September, 1981.

JOHN J. RILEY

United States Court of Appeals
For the First Circuit

No. 80-1324.

JOHN J. RILEY,
PLAINTIFF, APPELLANT,
v.
UNIVERSITY OF LOWELL, Et Al.,
DEFENDANTS, APPELLEES.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS
[HON. A. DAVID MAZZONE, *U.S. District Judge*]

Before COFFIN, *Chief Judge*,
CAMPBELL and BREYER, *Circuit Judges*.

John J. Riley on brief pro se.
Francis X. Bellotti, Attorney General, and *Alexander G. Gray, Jr.*, Assistant Attorney General, on brief for appellees.

June 23, 1981

Per Curiam. Appellant, an associate professor of English at the University of Lowell, alleging that he had been denied promotion to full professor because of his age, filed suit against the University, its president, vice-president, provost, the Dean of the College of General Studies (which included the Department of Languages and Literature where appellant taught), the deans of other colleges and the members of the Departmental Personnel Committee (which passed upon his applications for promotion). The action was grounded on the Age Discrimination In Employment Act (ADEA), 29 U.S.C. §§ 621-634; a civil rights statute, 42 U.S.C. § 1985; the First and Fourteenth Amendments to the Constitution; and a state tort claim of intentional infliction of emotional distress. A substi-

tuted amended complaint further alleged that defendants had harassed and retaliated against him for having initiated the present suit. A jury returned a verdict in favor of defendants on all claims.

On appeal three general areas of error are set out. It is argued that the district court erred in numerous evidentiary rulings, that it erred in its instructions to the jury and that throughout the trial the district court was openly prejudiced against the appellant. Most of these claims either overlap or are closely related. The prejudice claim permeates the entire argument on appeal. We find no merit in any issue listed.[1]

Appellant lists some thirteen specific instances where the district court allegedly erred in its evidentiary rulings. Nine of the thirteen claims of error ((a)(1), (4)-(11)) involve matters well within the district court's discretion, *viz*, whether to allow or disallow the introduction of evidence challenged as irrelevant, cumulative, repetitive or prejudicial, and whether the court could have reserved its ruling on defendants' motions for directed verdict (a-6). In each instance cited it is difficult to discern even a minimal measure of abuse of that discretion.[2] Three other claims ((a)(2)(3), (N)) deal with the court's treatment of plaintiff's expert witness, a psychiatrist who had treated appellant. Succinctly, the court allowed him to testify as to his diagnosis of appellant's condition and as to how he reached his conclusions. The court, however, instructed the jury that it need not accept as true those statements made by appellant to the psychiatrist as part of the medical history. Because this medical history was essentially a summary of the allegations of appellant's suit — *i.e.* his belief that although fully qualified he had been denied promotion because he was considered old, and that he was constantly harrassed — the

[1] For convenience we adopt and utilize appellant's listing of the claimed errors as it appears in his statement of issues on appeal.

[2] This includes the claim that it was error for the court to accept evidence of prior suits and grievances filed by appellant and to allow cross-examination on certain statistical evidence, a matter first raised by plaintiff.

court's instruction was entirely proper. Moreover, it neither detracted from the expert's testimony nor precluded the jury from accepting it in its entirety. One other argument (a-12) claims the district court admitted prejudicial hearsay. Having examined the pages of the transcript cited to us we disagree the evidence admitted was either hearsay or prejudicial.

Appellant next lists some fourteen specific instances [(b)-(e), (g), (i)-(m), (o)-(r)] where the court allegedly erred in its instructions to the jury. This part of the appeal is fatally flawed because the record contains no objections to the instructions given to preserve these issues for review on appeal. Fed.R.Civ.P. 51; *see McKinnon* v. *Skil Corporation*, 638 F.2d 270, 273 (1st Cir. 1981). In any event, we have examined the instructions and find they adequately and correctly charged the jury on the controlling law. On the ADEA claim the court correctly interpreted *Loeb* v. *Textron, Inc.*, 600 F.2d 1003 (1st Cir. 1979), and commendably framed its charge in simple comprehensible terms. In his attack on the jury instructions appellant makes much of the argument[3] that he fully met the four elements of a prima facie case of discrimination under *McDonnell Douglas* v. *Green*, 411 U.S. 792 (1973). Whether he did was for the jury to decide. Beyond this, even accepting that he had satisfactorily done so, he would be mistaken to labor under the misconception that this was sufficient to win his case. This established only a "legally mandatory, rebuttable presumption." *Texas Department of Community Affairs* v. *Burdine*, 49 U.S.L.W. 4214, n.7 (March 4, 1981). The nature of appellees' defense at trial, which was that the decision not to recommend promotion was governed by subjective discretionary elements which are traditional in the academic setting, *i.e.*, excellence in teaching, research and achievement of advanced degrees and service to the university and community, was more than sufficient to set out an issue proper

[3] Also, in this respect appellant dwells too heavily on matters which are more directed at attempting to show that the jury could not have decided as it did rather than explaining to us why the instructions were erroneous.

for the jury. *Id.* at 4216. *Cf. Banerjee* v. *Board of Trustees of Smith College*, 80-1475 (1st Cir. April 21, 1981) slip op. at 4-6 (requiring articulation of reasons for refusing tenure); *Beitzell* v. *Jeffrey*, 80-1395 (1st Cir. March 6, 1981) slip op. at 10-11 (same; discussing discretionary nature of university appointments). Lastly, we can perceive no error in the court's instructions with respect to the role of an expert witness or in the manner of assessing damages.

The last area of contention on appeal is appellant's allegation that the district court was prejudiced against him. To support this appellant points to the district court's evidentiary rulings and to particular comments by the trial court. However, adverse rulings alone, especially correct ones, are no measure of prejudice. *Blizard* v. *Frechette*, 601 F.2d 1217, 1221-22 (1st Cir. 1979). Further, having examined the comments complained of[4] we can only sympathize with the trial court's displeasure at being informed after a four day trial that appellant had continued suit against some defendants who were only remotely connected to the promotional process and others who had in fact voted affirmatively in favor of promotion. But even assuming the court's commentary strong — which we do not — because it was outside the presence of the jury there was no harm. The remaining claims of error listed are totally without any substance and deserve no further discussion.

Affirmed.

[4] Appellant particularly focuses on the following exchange which occurred during argument on defendants' motion for directed verdict:

"The Court: Well, someone is going to have to explain something before this case is over.

"I am going to get to the bottom of why this suit was brought, against whom it was brought, and the reasons why it has proceeded to this level in the current fashion.

"I just have too much — This is not a sandbox in which we all come in and play. This is a court of law, and if there is any basis for an action against some of these defendants, then they are entitled to be redressed for being forced to come here and answer charges, when the depositions taken long before this substitute amended complaint was filed indicated that at least Mr. O'Connor and Mr. Jarvis voted for Mr. Riley."

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APPENDIX B

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

JOHN J. RILEY,

Plaintiff

v.

UNIVERSITY OF LOWELL ET AL,

Defendants

CIVIL ACTION
No. 76-1118-M

MEMORANDUM AND ORDER

MURRAY, D.J. This case came on to be heard on the motions to dismiss of the defendants, and was considered on the oral arguments by counsel for the defendants and the plaintiff, pro se, and the memoranda of the parties. The defendants are the University of Lowell, the trustees thereof, and certain university officials and faculty members (university defendants), the Massachusetts Teachers Association and its local affiliate at the University, the Massachusetts Society of Professors, and an officer of each organization (union defendants). The action arises from the failure of certain defendants to recommend plaintiff for promotion to full professor, and the promotion of another instead. Plaintiff makes claims as follows: (a) the university defendants discriminated against him because of his age, (b) the university defendants acted in retaliation against him because of his opposition to unlawful practices at the University, (c) the university defendants and union defendants breached the collective bargaining agreement and refused to bargain in good faith with plaintiff, (d) the union defendants breached the duty of fair representation owed by them to plaintiff, and (e) certain defendants conspired together to prevent plaintiff from being considered for promotion.

After consideration of the arguments and memoranda, the court hereby Orders:

(1) that the claims against the university defendants and the union defendants based on violations of the Labor

Management Relations Act, 29 U.S.C. §§ 157, 158 and 185 be and the same hereby are dismissed because the court does not have subject matter jurisdiction of the claims.

(2) that the claims against the University of Lowell based on violations of 42 U.S.C. §§ 1983 and 1985 be and the same hereby are dismissed because the University is not a "person" as the term is used in §§ 1983 and 1985.

(3) that the claim against defendant Korff based on violation of 42 U.S.C. § 1985 be and the same hereby is dismissed. See Hahn v. Sargeant, 523 F.2d 461, 469 (1st Cir. 1975), cert. denied, 44 U.S.L.W. 3545 (U.S. Mar. 29, 1976); Harrison v. Brooks, 519 F.2d 1358 (1st Cir. 1975); Griffin v. Breckenridge, 403 U.S. 88 (1971).

(4) the motions are denied

(a) with respect to claims against the university defendants and the union defendants based on violations of Age Discrimination in Employment, 29 U.S.C. §§ 621 et seq.

(b) with respect to claims against defendants Walsh, Wiehe, Moore, McCaffrey, O'Connor and Jarvis based on violations of 42 U.S.C. § 1985.

Further Ordered, that all discovery in this case shall be accomplished on or before December 10, 1976.

Dated July 22, 1976

Frank J. Murray
United States District Judge

United States District Court

FOR THE

DISTRICT OF MASSACHUSETTS

CIVIL ACTION FILE NO. 76-1118-MA

JOHN J. RILEY,
Plaintiff

vs.

UNIVERSITY OF LOWELL, TRUSTEES OF UNIVERSITY OF LOWELL, WILLIAM T. HOGAN, FRANCIS R. WALSH, HOWARD K. MOORE, DANIEL E. DIAMOND, LEON BEGHIAN, JOHN B. DUFF, CHARLES E. JARVIS, GERARD J. O'CONNOR and JOHN J. McCAFFREY,
Defendants

JUDGMENT

This action came on for trial before the Court and a jury, Honorable A. David Mazzone, United States District Judge, presiding, and the issues having been duly tried and the jury having duly rendered its verdict, special and general verdict,

It is Ordered and Adjudged

Judgment for the defendants as to all counts.

Dated at Boston, Massachusetts, this 14th day of April, 1980.

APPROVED:

A. David Mazzone
UNITED STATES DISTRICT JUDGE

William T. Costello
Deputy Clerk of Court

Opposition

Office - Supreme Court, U.S.
FILED
DEC 7 1981
ALEXANDER L. STEVAS,

NO. 81-800

IN THE SUPREME COURT
OF THE UNITED STATES

OCTOBER TERM 1982

JOHN J. RILEY,
Petitioner, Pro Se,

v.

UNIVERSITY OF LOWELL, et al.,
Respondents.

BRIEF FOR THE RESPONDENT IN OPPOSITION.

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BRIEF FOR THE RESPONDENT IN OPPOSITION.

The petitioner attempts to seek review of the Decision of the First Circuit Court of Appeals which upholds a jury verdict in favor of the respondents. John J. Riley v. University of Lowell, et al., 651 F.2d 822 (1st Cir. 1981).

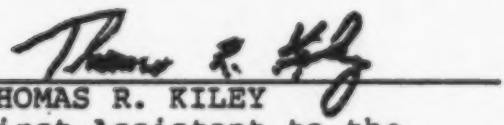
The petitioner brought suit against the University of Lowell and various individuals alleging that he had been denied promotion because of his age, and that the respondents had engaged in retaliation and harassment against him as a result of his having brought court action. A jury returned a verdict in favor of all respondents on all charges. The petitioner then appealed to the First Circuit Court of Appeals which upheld the jury verdict in a Per Curiam decision.

The petitioner is apparently now seeking further review of the trial. The issues that he has presented in his Petition for Certiorari were not presented to the First Circuit Court of Appeals, nor were they decided by that Court. Therefore, these issues are not

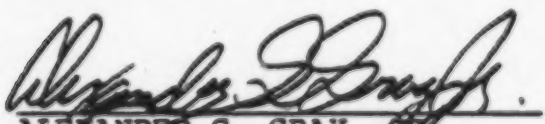
properly presented, and the Petition For Writ of Certiorari should be denied. F.T.C. v. Travelers Health Association, 362 U.S. 293 (1960); United States v. Fleischman, 339 U.S. 349 (1950) reh. den. 339 U.S. 991 (1950); McCullough v. Minnesota Tea Co., 296 U.S. 378 (1935).

Respectfully submitted,

FRANCIS X. BELLOTTI
ATTORNEY GENERAL



THOMAS R. KILEY
First Assistant to the
Attorney General



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